No. 2634

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CALEDONIAN INSURANCE COMPANY (a corporation), ROCHESTER GERMAN INSURANCE COMPANY (a corporation), CALEDONIAN AMERICAN INSURANCE COMPANY (a corporation) and SCOTTISH UNDERWRITERS (a corporation),

Plaintiffs in Error,

vs.

S. W. LEVY,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR FILED PURSUANT TO PERMISSION GRANTED.

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Filed this.....day of November, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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In his brief heretofore filed, and upon his oral argument, defendant in error has made the point that plaintiffs in error cannot be heard upon the merits because of the fact, first, that no special findings were made, and, second, they did not, upon the trial of the case in the court below, make formal motion for nonsuit.

Defendant in error makes the further point that defendant in error is in any event entitled to an affirmance of the judgment on his first count, for the reason that the evidence shows that he performed the contract during the month of April, 1907.

I.

We respectfully submit that the contention first stated is without merit. The case was tried before the court sitting without a jury under a written stipulation and was submitted upon the evidence taken at the former trial and the testimony of Mr. Conroy corroborating and not conflicting therewith. In other words, the facts were as testified to upon the former trial and without conflict as between the witnesses upon any point, all agreeing that the dealings as between Levy and the companies subsequent to the attempted rescission were as presented to this court upon the former appeal and upon which it was held that defendant in error could not recover. This was as held by this court in its opinion upon our first appeal. *The question presented to the court for decision was purely one of law,* to wit, whether or not, upon the evidence, which, as we have said, was without conflict upon any point, judgment ought to go for plaintiffs in error or for defendant in error. To make evident that it was a pure question of law which was submitted to the court below and that this court so

held, we have but to quote from the opinion of this court upon the former writ of error where Mr. Justice Ross says:

> "The facts of the case are undisputed. It is so conceded by counsel and so stated by the trial court. * * * In our opinion there was nothing for the jury to pass upon. The real question in the case being one of law."

And in the opinion of the trial judge rendering his decision upon the second trial, it is stated that "the evidence as to what was done by the parties tending to establish performance was substantially the same" as on the former trial (Trans. of Record, p. 86). And it is part of the record upon the last trial that Mr. Levy refused to accept the rescission of the companies and that the latter went on and took the business as theretofore (Trans. of Record, p. 84).

Our position in the court below was, as it is now in this court, that the defendant in error, upon the undisputed facts in the case, could not have judgment, for the reason that the evidence upon which the submission was based was the same evidence, which, on the former trial, was offered by Levy to support his contention that he *had performed* his part of the contract. He now contends that he *did not perform* only because plaintiffs in error had repudiated the contract and that he had accepted such repudiation as a termination of the contract. It is inconceivable that the same evidence can be offered to prove performance at one trial of

the case, and to prove non-performance at a second trial. If such a situation can exist, then it can exist only as a matter of law. It was upon such theory that the case was tried in the court below, and submitted practically upon an agreed statement of fact. This is borne out by the record. We quote from pages 67 et seq. of the Transcript:

> "The COURT. That was the proposition upon which the case was reversed, was it not?
>
> Mr. ORRICK. Yes.
>
> Mr. Wise then made the opening statement on behalf of defendants.
>
> Plaintiff's counsel thereupon offered to submit the case on the evidence taken on the former trial thereof as shown in the reporter's transcript of said trial, supplemented by such additional testimony as should be offered. In the course of the discussion which ensued, Mr. Van Ness said:
>
> 'Mr. VAN NESS. I am willing to admit, and it seems to me that the admission is as broad as anything you could claim. In the beginning we took the position that by reason of the destruction of San Francisco we were released and so notified you, and you considered we were not released and insisted on going on with the contract. I told you that if we were wrong in our view we would pay you the $1000 a month. We took that position from the beginning to the end.'
>
> The court then ordered, pursuant to the agreement of the parties, that the evidence taken at the former trial as shown by the reporter's transcript thereof, should be considered in evidence at this trial."

It is apparent that the intention of both parties was to submit the case on the entire record of the

previous trial. This obviously was meant to include, not only the oral testimony, but the rulings of the court and the exceptions reserved. It was so considered not only by counsel but also by the court, and we submit that in arriving at a decision, the court below treated the case as submitted upon an agreed statement of facts.

And we respectfully submit that in such a case as this the appellate court should decide the case upon its merits as a question of law.

Southern Railway Co., Plaintiff in Error, v. Atlanta National Bank, Defendant in Error, 50 C. C. A. 558; 56 L. R. A. 546;

Erkel v. U. S., 169 Fed. 623;

Ins. Co. v. Kelly, 114 Fed. 268;

City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329;

Board of Supervisers of Wayne Co. v. Kennicott, 103 U. S. 554;

Fellman v. Royal Ins. Co., 185 Fed. 689;

Levy v. Caledonian Ins. Co. et al., 199 Fed. 407, 411;

Porter v. Davies Co., 223 Fed. 467;

Hipple v. Bates Co., 223 Fed. 23;

Wiborg v. U. S., 163 U. S. 638-58; 16 Sup. Ct. 1127; 41 L. Ed. 289;

Clyatt v. U. S., 197 U. S. 207; 25 Sup. Ct. 429, 49 L. Ed. 726.

In the case first above cited suit was brought by the bank against the railway company to recover

because of wrongful delivery of cotton shipped upon its road and upon bills of lading issued upon which the bank had loaned money. As in the case at bar, the trial was before the court without a jury and was submitted for decision upon the report of an auditor, to whom there had been a reference to take testimony, and as to the facts reported by him there had been in that case, as in this, an agreement that the facts were as stated in the report of the referee, and the submission was to the trial court upon these facts, and in the upper court the question for decision was whether or not upon the facts as stated in the report of the referee and in the opinion of the trial judge judgment should go for plaintiff or defendant in error. In other words, as stated in the opinion in the case which we have cited the case was submitted "for the court to enter a judgment therein on the law and the facts without the intervention of a jury", and upon this stipulation the trial court, as in the case at bar, proceeded to consider what conclusion it ought, as a matter of law, to draw, and what judgment it ought to render. It will be seen that both the trial and the appellate courts dealt with the question thus submitted to them as one of law, not calling for any preliminary motion to the trial judge, or exception to ruling by him, but only a ruling in the appellate court as to the correctness of the judgment reached upon the undisputed facts upon which the trial judge was called to act.

We respectfully submit that the submission in the court below can permit of no other interpretation than a submission upon an agreed statement of facts, or, as stated by this court in the Erkel case, referred to above, "upon a case stated". Under such a submission it has been uniformly held that the agreed statement or "case stated" will be considered as a special finding and the appellate court will review the question as to whether such agreed statement or "case stated" is sufficient to support the judgment.

Mr. Justice Gilbert in Erkel v. U. S., 169 Fed. 623, says:

> "It is well settled that no question of law can be reviewed on error except those arising upon process, pleadings or judgment *unless* the facts are found by a jury by a general or special verdict, *or are admitted by the parties upon a case stated.*" (Italics ours.)

> Where an action at law tried by the court without a jury is submitted on an agreed statement of facts which is filed and made a part of the record (same as bill of exception here), such statement is the equivalent of a special verdict and the court's conclusion of law based thereon is subject to review.
>
> Ins. Co. v. Kelly, 114 Fed. 268.

> Where a jury is waived pursuant to Sections 649 and 700 Revised Statutes, and no special finding of facts is made, or requested, the only questions reviewable by the Circuit Court of Appeals are:
>
> 1. Whether judgment is supported by pleadings.

2. *Whether there is any substantial evidence to support it.*

3. Whether error has been committed in admission or exclusion of evidence. (Italics ours.)

City of Mankato v. Pacing Co., 142 Fed. 329.

A judgment on agreed facts spread at large on the record, can be reviewed in the appellate court on writ of error.

Board of Supervisors of Wayne Co. v. Kennicott, 103 U. S. 554.

In Fellman v. Royal Ins. Co., 185 Fed. 689, the court holds:

That suing out a writ of error is a sufficient exception to judgment; also, that where there is an *agreed statement of facts the upper court will review.*

In Levy v. Caledonian Ins. Co. et al., 199 Fed. 407, at 411 (the case at bar), through Mr. Justice Ross, the court says:

"There was a verdict for plaintiff. In our opinion there was nothing for a jury to pass upon; the real question in the case being one of law."

And such being so, the record here is tantamount to an agreed statement of facts, or "case stated", and should be treated as such.

The request of counsel for the receiver at the close of the evidence for findings and judgment in his favor has the same effect as a request for an instructed verdict.

Porter v. Davies Co., 223 Fed. 467.

> Where a case was tried upon an agreed statement of facts, although that statement was *quite prolix and with much redundant matter,* but contained the ultimate facts upon which the case depended, such an agreed statement of facts is treated like special findings by a trial court, or a special verdict by the jury, and as to whether the facts stipulated to are sufficient to support the judgment will be reviewed. (Italics ours.)
>
> Hipple v. Bates Co., 223 Fed. 23.

It has also been held that where the error is apparent the fact that no request for a directed verdict is made will not prevent the appellate court from considering the sufficiency of the evidence.

> Wiborg v. U. S., 163 U. S. 632-58; 41 L. Ed. 289;
>
> Clyatt v. U. S., 197 U. S. 207; 25 Sup. Ct. 429; 49 L. Ed. 726.

The same rule must apply to a case where no specific motion for nonsuit is made where the case is tried by a court sitting without a jury.

The court will notice plain error not assigned.

> Rule 11, C. C. A.

It is conceded by defendant in error that the question of whether the demurrer to the original complaint was properly overruled, may be considered by this court. An examination of the record discloses that the complaint sets forth the material facts relied upon by Levy to support a recovery. Even assuming that the other assignments of error may not be considered, we respectfully submit to

this court that the argument made by us in our first brief applies as well to the demurrer to the complaint as to the insufficiency of the evidence. This brings us within the rule suggested in City of Mankata v. Barber Asphalt Paving Company, 142 Fed. 329, where it was held:

> "Where a jury is waived by stipulation in a circuit court and no special finding of fact is made, the only questions reviewable by the Circuit Court of Appeals are whether the judgment is supported by the pleadings *whether there is any substantial evidence to support it,* and whether error was committed in the admission or exclusion of evidence. Most of the important facts relied on by defendant city to defeat recovery appear in the pleadings. For this reason, we are fortunately able to consider their merits, unembarassed by the rule just stated."

It has never been the policy of our courts to decide an appeal upon technical defects in the record, but wherever possible, to determine the case on its merits. From the authorities cited by us, we respectfully submit that this court is relieved from any embarrassment in this regard, and we believe that a consideration of this appeal upon its merits entitles plaintiffs in error to a reversal of the judgment with instructions to the trial court to enter judgment for defendant in error in the sum of $237.45, being the amount claimed under the fourth count of the complaint.

Without juggling with words, the submission in this case and the requests of plaintiffs in error for a judgment upon the facts was as much a motion

for nonsuit as if put in that form. Our position in the court below was, as it now is in this court, that defendant in error upon the undisputed facts in the case could not have judgment for the reason that, from the evidence upon which the submission was based, there had been a failure to perform his part of the contract and that within the law of the case as settled by this court judgment must go for plaintiffs in error, and that he could not be heard upon his new contention that he had not performed and was asking damages by reason of the breach of the original contract by the defendant companies. In other words, we asked the court to hold that upon each and all of the facts conclusively and without conflict established by the evidence defendant in error had failed to make a case and as matter of law could not recover upon either his original or later contention. Of course, until the decision by the trial court there could be no exception taken to the action of that court for the reason that there had been no decision by it, and, therefore, there was nothing to except to.

And as we have seen in the opinion of the trial judge rendering his decision upon the second trial, it is stated that "*the evidence as to what was done* by the parties tending to establish performance was substantially the same" as on the former trial (Trans. of Record, p. 86).

And that the trial judge did not find that the deduction of the fifteen per cent for the purpose of paying office expenses during the second year was

intended by Levy to negative his claim of performance is entirely plain. We quote from the opinion of the judge upon this point (Trans. of Record, p. 88):

> "During the remainder of the period covered by the terms of the contract, while plaintiff continued as before to take his insurance to the defendants, he from that date withheld the usual brokerage fees of fifteen per cent., instead of paying the premiums in their entirety to the defendants as stipulated in the contract. It is true that this was done in a manner to indicate that plaintiff believed, or at least hoped, that the course he was pursuing would constitute a substantial compliance with the terms of the contract, and enable him to recover therefor, and that was the theory upon which the first trial proceeded."

The learned trial judge adds:

> "In fact there is no doubt but what plaintiff did in the premises was intended to give him 'two strings to his bow'. In other words, that if his acts did not constitute a performance it would put him in a position to recover as for a breach."

No further comment upon the last quotation from the opinion of the trial judge than such as hereinbefore and hereinafter is made is necessary.

As to what is said by Judge Van Fleet in his opinion (Trans. of Record, p. 89) to the effect that plaintiff's refusal at first to acquiesce in defendants' renunciation of the contract did not preclude him from his subsequent determination to do so: that

> "the contract was one which gave him a new right of action monthly, and he was entitled to change his course as to defendants' renunciation at any time before the contract was at an end as to all payments thereafter falling due",

it is only necessary to say that what Mr. Levy did was not an acceptance of the companies' previous renunciation at any time during the life of the contract. From month to month during the second year he went on, according to his theory, performing as he understood the meaning of the contract but not performing as understood by this court because we have seen what he did was intended to operate as performance, and the deduction of the fifteen per cent was not intended to be a renunciation of performance.

In this connection, and as demonstrating that the situation below was, and is, as stated, we have but to call the court's attention to the fact that both parties submitted the cause to the court with an implied request for judgment! What other interpretation can be placed upon the act of submission? Certainly it was not an idle submission. The cause came on for trial on December 11, 1913, and the court did not, until September 25, 1914, render its decision. What other interpretation can be made of the record than that each party submitted its cause to the court below, each asking for judgment?

The new testimony of Mr. Conroy upon the second trial did not in any way tend to make a different case. That Mr. Levy did not during the

second year demand payment of the one thousand dollars ($1,000) at the end of each month was not in anywise an alteration of his position that he had performed and was performing upon his part. He went on giving *all his* business to the plaintiffs in error, *and giving them credit for all the* brokerage commissions received by him upon business placed with other companies. *His explanation that during the second year he was retaining the usual brokerage commission of 15% to meet his office expenses is strongly conclusive upon the proposition that during all of the second year, there was a continuing claim of performance upon his part, for otherwise no such excuse could have been called for.*

We further submit that the position of defendant in error taken upon the last trial should have received the condemnation of the trial court as we believe it will that of this court because of the fact that it was nothing more or less than a wretched subterfuge, held out as a door through which the court might pass in support of a judgment in favor of plaintiff. As pointed out in our opening brief, defendant in error was called upon in the trial court to elect whether he would proceed upon the theory of performance or non-performance, and, thereupon, after full consideration, with advice of counsel, he had elected to proceed upon the theory of performance, and under oath, and in both the trial court and this court, maintained that there had been no failure of performance upon his part; that he had performed, and that he was entitled to

judgment as upon full performance, *contending that he had the right, under the contract, to retain the fifteen (15) per cent brokerage commission upon business placed with the defendant companies as a means of meeting his office expenses, and that this did not constitute a breach of the contract upon his part.* In other words, he, in effect, under the advice of counsel, struck out from his complaint all but his cause of action based upon his claim of performance, but, according to his present theory, reserving the right, if beaten upon that theory, to come back and say that what he had previously claimed under oath was not true and that the court should now and in the face of this stultification permit him to recover as against plaintiffs in error. This claim of non-performance is now made in the face of the admitted fact that it was plaintiff's intention and purpose to perform.

But whether right or not as to the attempt of defendant in error to change his position since the former trial it has been plainly shown that there is absolutely no merit in this contention and that from beginning to end he insisted upon the maintenance of the contract in force, and that he had from start to finish performed and was performing the contract. His demand at the end of each month during the first twelve months for the thousand dollars, which the contract provided should be paid him, is conclusive upon this point as was his placing during all of the second year of all his business with the defendant companies and

the giving of credit to them, whenever they were unable to accept the business which he offered, of the premiums upon such business placed with other companies, accompanied by his explanation as to why he deducted the 15% for office expenses. The facts upon which this contention is based are the same facts upon which, upon the first trial and the first appeal, the case was submitted in the lower court and in this court, except upon the last trial the testimony of Mr. Conroy was added which corroborated but did not upon the question of performance change the record of the first trial. It is upon the same facts that judgment was asked for upon the second trial. It was not contended that there had been any change as to the facts or that there was any conflict upon which judgment should go in his favor as against the defendant companies. The question for decision therefore was one of law, and we submit that both upon principle and under the authority of the cases which we have cited the controversy between the parties is a matter of law and not upon a disputed question of fact, and, therefore, under the authorities cited the case stated is to be considered as a special finding, within the jurisdiction of this court to pass upon. That both the trial court in the opinion which it has rendered as did this court upon the former appeal have looked upon the question for decision as one of law and not calling for the decision of any conflict in the evidence is entirely apparent and should be

conclusive upon the point which we have been discussing.

II.

Defendant in error contends that the evidence was sufficient to justify the court in finding that Levy was entitled to recover his salary for the month of April, 1907. His right to recover this amount is based solely upon the theory of performance. As to this court, the decision thereof upon the previous appeal is, we submit, *res adjudicata.* It was held that Levy did not perform during any portion of the second twelve month period. This included the month of April, 1907. No attempt was made at the trial to amend the complaint as to this first count, which proceeded solely upon the theory of performance. No new or different testimony was offered to support this count. The only justification offered by defendant in error to support the judgment of the trial court as to the first count, is that the evidence shows that the fifteen per cent brokerage fee which was deducted by Levy during the second year was not retained from the April business until June. The second year of the contract commenced April 1, 1907. The record shows (Trans. of Record, p. 73):

> "Q. After April 1, 1909, and for the second twelve month period, Mr. Levy deducted from the volume of business which he produced fifteen per cent commission, the same commission which any broker would have received

who brought the business into Mr. Conroy's company?

A. Yes, sir."

The reason that such deduction was not made until June was that under a well established custom of the insurance business, settlement of premiums on fire insurance is not made until sixty days after the insurance takes effect. During the entire life of the contract, Levy collected the premiums on insurance written by him and settlement was made for premiums collected sixty days after they became due. We quote from the Transcript, page 70:

"We did not bill the assured for sixty days. At that time we were allowed sixty days for collection of premiums."

For that reason, the deduction of the fifteen per cent on the April business could not be made until June, 1907. We quote again from the Transcript, page 72:

"The COURT. Did you pursue the same course and place all your business through that office after that date, the same as before?

A. Yes, your Honor.

Q. But after that date you did deduct the 15 per cent commission on premiums?

A. In making our payments, yes, sir.

Mr. GOODFELLOW. Q. After the month of June I thought you said?

A. It was during the month of June, but that was for the insurance of the month of April, previously placed."

The fact that the deduction was in June and not in April does not in the least change the fact that

there was not performance for April. The record shows that such deductions made in June were for April business. We respectfully submit that the law of the case settling the proposition that Levy did not perform his contract during the month of April, 1907, has disposed of this contention of defendant in error.

Dated, San Francisco,
November 15, 1915.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.